No. 15814

See: Vol. 3082

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL-CIO,
Respondent.

No. 15814

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR AMICUS CURIAE, ALLOY MANUFACTURING COMPANY

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I.

STATEMENT OF PLEADING AND FACTS

The basis upon which it is contended that the Court of Appeals has jurisdiction of this matter is set forth in the brief of the Petitioner. Amicus Curiae is in accord with the statment of jurisdiction by the Petitioner.

By virtue of the leave granted by the Court on June 25, 1958, Alloy Manufacturing Company files this brief as Amicus Curiae. Amicus Curiae has a direct interest in the decision in this matter in that the unlawful picketing and appeals to its customers by the Respondent Union have had and continue to have a detrimental effect on the business and financial status of the Company.

In the interest of brevity, Amicus Curiae accepts the resume of Pleadings and Proceedings as set forth in the Petitioner's brief and accepts the statement of facts as set forth in Pages 2 to 7 of the Petitioner's brief.

II.

STATEMENT OF THE CASE

The issues in the present case are:

1. Whether picketing, with the avowed purpose of obtaining the employer's signature to a contract the terms of which require recognition of the Union as bargaining agent and require membership in the Union, in the absence of the Union being certified by the National Labor Relations Board, has a tendency

to coerce and restrain the Employees of the subject Employer within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act.

2. Whether within the meaning of Section 8(b)(2) of the Act such a course of conduct causes or attempts to cause the subject Employer to discriminate against the Employees in violation of Section 8(a)(3) of the Act.

3. Whether continued picketing and economic pressure (publication of the subject Employer's firm on a Union "We Do Not Patronize" list and appeals by Union representatives to the subject Employer's customers to cease dealing with the subject Employer) before and after a duly certified National Labor Relations Board election in which the Union has been unanimously rejected by the Employees has a tendency to coerce and restrain the Employees of the subject Employer within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act.

4. Whether within the meaning of Section 8(b)(2) of the Act such a course of conduct causes or attempts to cause the subject Employer to discriminate against the Employees in violation of Section 8(a)(3) of the Act.

III.

SPECIFICATION OF ERRORS

Amicus curiae does not assert that any errors were committed by the National Labor Relations Board in its determination of this matter. The position of

amicus curiae is in support of the Decision and Order as amended January 30, 1958, by the National Labor Relations Board.

IV.

ARGUMENT

A. Picketing may be prohibited if shown to be for an unlawful purpose.

B. The purpose of the picketing and economic pressure (publication of the subject Employer's firm on a Union "We Do Not Patronize" list and appeals by Union representatives to the subject Employer's customers to cease dealing with the subject Employer) herein is unlawful and coercive.

C. Reason and logic support the rule that picketing and economic pressure after repudiation in a National Labor Relations Board election and picketing and economic pressure for a union shop contract in the absence of being certified as bargaining representative is coercive and prohibited under Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act.

A. Picketing May Be Prohibited If Shown to Be for An Unlawful Purpose.

The case of *Thornhill v. Alabama* (310 U. S. 490) sets forth the general rule that picketing may be free speech and protected by the First Amendment to the United States Constitution. The *Thornhill* case was decided in 1940 and since that time there have been many factual situations superimposed upon this gen-

eral rule with varying results. There have also been pronouncements by the United States Supreme Court that "picketing is not equivalent to speech." *Bakery Drivers v. Wohl* (315 U. S. 769). As will be shown the broad statement of immunity in the *Thornhill* case has been greatly modified in cases of coercive picketing.

In *Giboney v. Empire Storage and Ice Company* (336 U. S. 490) (1949) at Page 498 the United States Supreme Court was asked to decide whether the picketing union could, on the basis of free speech, violate a Missouri antitrust statute. The Court stated,

> "Neither *Thornhill v. Alabama,* supra, nor *Carlson v. California* (310 U. S. 106), both decided the same day, supports the contention that conduct otherwise unlawful is always immune from state regulation because an integral part of that conduct is carried on by display of placards by peaceful picketers. In both these cases this Court struck down statutes which banned dissemination of information by people adjacent to certain premises, pointing out that the statutes were so broad that they could not only be utilized to punish conduct plainly illegal but could also be applied to ban all truthful publications of the facts of a labor controversy. But in the *Thornhill* opinion, at pages 103-104, the Court was careful to point out that *it was within the province of states 'to set the limits of permissible contest open to industrial combatants.'* " (Emphasis supplied)

On this basis the United States Supreme Court affirmed the decision of the Missouri court in granting the injunction.

A case which arose in Washington, as did the in-

stant case, is that of *Building Service Employees International Union v. Gazzam* (339 U. S. 532, 70 Sup. Ct. 784) (1950). The question as stated by the U. S. Supreme Court in that case in the beginning of the opinion was:

> "It is the public policy of the State of Washington that employers shall not coerce their employees' choice of representatives for purposes of collective bargaining. Do the First and Fourteenth Amendments to the Federal Constitution permit the state, in reliance on this policy, to enjoin peaceful picketing carried on for the purpose of compelling an employer to sign a contract with a labor union which coerce's his employees' choice of bargaining representatives?"

The U. S. Supreme Court reasoned (P. 537):

> "This Court has said that picketing is in part an exercise of the right of free speech guaranteed by the Federal Constitution (citing *Thornhill v. Alabama,* supra, and *American Federation of Labor v. Swing* (312 U. S. 321) and other cases). But *since picketing is more than speech* and establishes a locus in quo that has far more potential for inducing action or non-action than the message the pickets convey, this Court has not hesitated to uphold a state's restraining of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity (citing cases)." (Emphasis supplied)

The U. S. Supreme Court answered its statement of the question in the affirmative and affirmed the injunction granted by the State of Washington Supreme Court.

In *Hughes v. Superior Court of Contra Costa County* (339 U. S. 460, 70 Sup. Ct. 718) (1950) the U. S. Su-

preme Court affirmed the right of the California Court to enjoin picketing for an unlawful purpose.

In another case decided in 1950, the U. S. Supreme Court in *International Brotherhood of Teamsters v. Hanke* (339 U. S. 470, 70 Sup. Ct. 773) (at Page 474) affirmed the doctrine that:

> "We must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech."

The case also arose in the State of Washington and the U. S. Supreme Court again affirmed the right of the State of Washington to restrain picketing and affirmed the conclusion of the State Court that (P. 477)

> "the conclusion seems irresistible that the union's interest in the welfare of a mere handful of members (of whose working conditions no complaint at all is made) is far outweighed by the interests of individual proprietors and the people of the community as a whole, to the end that little businessmen and property owners shall be free from dictation as to business policy by an outside group having but a relatively small and indirect interest in such policy."

Without belaboring the point further, it would appear that in the eyes of the United States Supreme Court "picketing is more than speech" and may be enjoined if unlawful or against the public policy of the State or Federal government.

B. The Purpose of the Picketing and Economic Pressure Herein Is Unlawful and Coercive.

The union representatie has admitted in his testimony that the purpose of the picketing was to force the employers to sign a union shop contract and thereby force the employees into the Union. (Tr. p. 83.)

The results of a National Labor Relations Board election in which the employees unanimously rejected the union are also a part of the record in this case. (General Counsel's Exhibit No. 4.)

The undisputed testimony is that the Union representative would not solicit membership in the Union by contacting the employees but on the contrary adopted the course of conduct which tried to force the union upon them by economic pressure. (Tr. p. 112.)

The only contract offered by the Union was introduced into evidence at the hearing (General Counsel's Exhibit No. 7) and contains the following clauses:

ARTICLE I

UNION RECOGNITION

> The Employer herewith recognizes and accepts Automotive Lodge #942 as the "sole" and exclusive colective bargaining agent for all employees engaged in the repair, maintenance, and service of automotive equipment, excluding only New and Used car salesmen, service salesmen, office employees, guards, and supervisors as defined in the Act.

ARTICLE III

UNION SECURITY

> All employees covered by this Agreement, as a condition of employment, shall become members of, and maintain membership in the Union on and after the 31st day following the beginning of such employment, or the effective date of this Agreement, whichever is the later.

which would require the employees to join the Union or seek other employment.

Under oath in the National Labor Relations Board hearing in Case No. 19-RM;169 held prior to the election, the Union representative testified that he represented none of the employees at the employer's plant. (Tr. pp. 63-64; Gneral Counsel's Exhibit No. 6.)

The union representative admitted that he had gone further than picketing in his endeavors to compel union membership. He admitted contacting the Governor of the State of Washington by telegram in an attempt to stop the employer from performing work on state vehicles. (Tr. p. 77, p. 80.) He admitted contacting the Spokane branch of the International Harvester Company for the purpose of discouraging International Harvester Company from sending work to the employer. (Tr. p. 79.) He admitted contacting the manager of the Rainier Brewery Company concerning work the employer was doing for that company and discouraging the manager from sending further work to the employer. (Tr. p. 81.)

It was stipulated by the parties that the employer was placed on the union "We do not patronize" list

and was so publicized by the local labor newspaper from the time the picketing began until the latest issue of the newspaper. (Tr. p. 76; p. 123.)

Many other instances of picketing and economic pressure could be cited from the record but these instances serve to show that the calculated plan of the union was and is:

(1) To disregard the choice of the employee as shown in the NLRB election.

(2) To coerce the employer to sign a union shop contract without regard for the employee's wishes.

(3) To coerce the employees through economic pressure to join the union in order to protect their jobs.

It is submitted that such activity is coercive, unlawful and should be enjoinable.

As will be shown the applicable statute of the State of Washington has been determined by the U. S. Supreme Court to condemn picketing of the type employed in the instant case. Although the statute of the State of Washington is not controlling in the present case it should be noted that it contains the same provisions as the National Labor Relations Act with respect to the right of employees to be free from coercion by either labor organization or employers in their choice of representatives. Revised Code of Washington 49.32.020 provides as follows:

"Although he (the individual unorganized worker) should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his em-

> ployment and that he be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protections."

Since this statute, identical in substance to the provisions of Section 8(b)(A) and 8(b)(2) of the Act, has been interpreted by the U. S. Supreme Court as prohibiting the same type of picketing in other cases, in effect the U. S. Supreme Court has already ruled that such picketing is coercive and should be enjoined.

In the *Building Service Employees v. Gazzam* case the United States Supreme Court stated (Page 538):

> "Under the so-enunciated public policy of Washington, it is clear that workers shall be free to join or not to join a union, and that they shall be free from the coercion, interference, or restraint of employers of labor in the designation of their representatives for collective bargining. *Picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce a transgression of this policy,* and the State here restrained the advocates of such transgression from further action with like aim. To judge the wisdom of such policy is not for us; ours is but to determine whether a restraint of picketing in reliance of the policy is an unwarranted encroachment upon rights protected from state abridgement by the Fourteenth Amendment."

At Page 540 the U. S. Supreme Court said:

> "Here, as in *Giboney* (supra), the union was using its economic power with that of its allies to compel respondent to abide by union policy

rather than by the declared policy of the State. That state policy guarantees workers free choice of representatives for bargaining purposes. If respondent had complied with the petitioner's demands and had signed one of the tendered contracts and lived up to its terms, he would have thereby coerced his employees. The employees would have had no free choice as to whether they wished to organize or what union would be their representative. The public policy of Washington relied upon by the court below to sustain this injunction is an important and widely accepted one. The broad purpose of the Act from which this policy flows was to prevent unreasonable judicial interference with legitimate objectives of workers. But abuse by workers or organizations of workers of the declared public policy of such an Act is no more to be condoned than violation of prohibitions against judicial interference with certain activities of workers. We therefore find no unwararnted restraint of picketing here." (Emphasis supplied)

It should be noted that the "so-enunciated" public policy of the State of Washington referred to in the *Building Service Employees International Union v. Gazzam* case has remained unchanged since the decision in that case and is still contained in Revised Code of Washington 49.32.020, as quoted previously and was recently examined and affirmed again in the case of *Audubon Homes, Inc. v. Spokane Building and Construction Trades Council et al,* 298 Pacific II 1112. In that case the union had no members among the employees and the court enjoined what the union termed "organizational picketing." The court quoted with approval the rule laid down in the *Swenson v. Seattle Labor Council* case (set forth in this brief)

and also said (Page 150):

> "Although peaceful picketing is recognized as an exercise of the right of free speech and therefore lawful, it cannot be made the cover for concerted action against an employer in order to achieve an unlawful or prohibited objective or an objective which is contrary to the declared public policy of the state, citing *Vogt, Inc. v. International Brotherhood of Teamsters, Local 695, AFL,* 74 N. W. II 749, 29 Labor Cases #69747 (1956)."

The court also said (Page 149):

> *"It is not clear from the record whether the ultimate purpose of the picketing was to coerce plaintiff into having his employees join a union* or since defendants had not even approached plaintiff, to cut off plaintiff's building materials and thus force plaintiff's business to die on the vine. *In either event, the picketing was coercive and unlawful.* Citing *Fornili v. Auto Mechanics Local No. 297 of the International Association of Machinists,* 200 Washington 283, 93 Pacific II 422, 1 Labor Cases #18456 (1939)." (Emphasis supplied)

In another case arising in the State of Washington involving stranger picketing after a NLRB election the State of Washington Supreme Court stated in *Swenson v. Seattle Central Labor Council,* 27 Washington 2nd 193, 188 Pacific 2nd 873, 12 Labor Cases #63610 (1947), at Page 206:

> "The United States Supreme Court has, by these cases, established this rule: Peaceful picketing is an exercise of the right of free speech. Organized labor has the right to communicate its views either by word of mouth or by the use of placards. This is nothing more nor less than a method of persuasion. But when picketing ceases to be used for the purpose of persuasion—

> just the minute it steps over the line from persuasion to coercion—it loses the protection of the constitutional guaranty of free speech, and a person or persons injured by its acts may apply to a court of equity for relief. The facts in this case convince us that the picketing complained of did not constitute an exercise of free speech as contemplated by our founding fathers. . . . This was coercion."

As previously stated the State of Washington statute guarantees to the employees the same right to refrain from union organization as does the National Labor Relations Act. The Washington statute has been interpreted and applied by both the State court and the U. S. Supreme Court to prohibit picketing of the type employed in the present case being coercive. The decision of the U. S. Supreme Court in these cases should be controlling in the present case.

The public policy of the Federal government is found in the National Labor Relations Act. Section 1 of the Act states that:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives *of their own choosing,* for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." (Emphasis supplied)

Section 7 of the Act set forth the rights of employees:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively *through representatives of their own* choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and *shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).*" (Emphasis supplied)

It should be noted that the underlined portion of the section quoted, that is the "right to refrain," is the part added by Taft-Hartley amendments of the National Labor Relations Act of 1947.

In the Conference Report, House Report 510, issued June 3, 1947, 80th Congress, Pages 38 to 40 it was pointed out that:

> "Both the House bill and the Senate amendment in amending the National Labor Relations Act preserved the right under Section 7 of that Act of employees to self-organization to form, join, or assist any labor organization, and to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The House Bill, however, made two changes in that section of the act. First, it was stated specifically that the rights set forth were not to be considered as including the right to commit or participate in unfair labor practices, unlawful concerted activities, or violations of collective bargaining contracts. *Second, it was specifically set forth that*

employees were also to have the right to refrain from self-organization, etc., if they chose to do so. . . . The second change made by the House bill in Section 7 of the act (which is carried into the conference agreement) also has an important bearing on the kinds of concerted activities which are protected by Section 7. *That provision, as heretofore stated, provides that employees are also to have the right to refrain from joining in concerted activities with their fellow employees if they choose to do so.* Taken in conjunction with the provisions of section 8(b)(1) of the conference agreement . . . wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in Section 7, it is apparent that many forms and varieties of concerted activities which the Board, particularly in its early days, regarded as protected by the Act, will no longer be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act." (Emphasis supplied)

Senator Taft's understanding and intent on the right of employees to refrain from joining a labor organization are found in 93 Congressional Record 4023 (4143 in Board published volume), 4017 (4137 in Board published volume), 4022 (4143 in Board published volume), and 4024 (4144 and 4145 of Board published volume). A perusal of these pages clearly demonstrates that the intent of Senator Taft was that the right to refrain from joining a labor organization was a protected right of the employee and any attempted coercion to defeat that right was an unfair labor practice. At page 4022 of Volume 93 of the Congressional Record Senator Taft said:

"If a man is invited to join a union its members ought to be able to persuade him to join, but if they should not be able to persuade him they should not be permitted to interfere with him, coerce him, and compel him to join the union. *The moment that such a man is threatened with losing his job if he does not join, it at once becomes an unfair labor practice.* Threats and coercion ought to become unfair labor practices on the part of a union."

At Page 4023 of Volume 93 of the Congressional Record Senator Pepper queried:

"Will the Senator not have to admit that there is no definition of coercion that will leave it clear as to what can be done and what cannot be done?"

Senator Taft replied:

"The Board has been defining those words for 12 years, ever since it came into existence. Its application to labor organizations may have a slightly different implication, but it seems to me perfectly clear that from the point of view of the employees the cases are parallel. *The effect of the bill is to include both labor union leaders and individual employers.*" (Emphasis supplied)

Again at Page 4023, Senator Taft said:

"Mr. President, let me point out that the amendment protects men who may not be members of unions at all. In fact, many of the cases of coercion are cases in which there never has been a certification of a union, cases in which a union is attempting to organize sends its representatives to the plant and coerces the employees to join that union."

At Page 4023 of Volume 93 of the Congressional Record Senator Taft in speaking of the specific case of *Hall Freight Lines, Inc.* (65 NLRB 397) said:

> "The main threat was, 'Unless you join our union, we will close down this plant, and you will not have a job.' *This was the threat, and that is coercion—something which they had no right to do.*" (Emphasis supplied)

Section 8(b)(1)(A) of the Act provides that it shall be unfair labor practice for a labor organization or its agents "to restrain or coerce employees in the exercise of the rights guaranteed in Section 7"—one of which rights is the right to refrain from joining a labor organization.

Section 8(b)(2) of the Act provides that it shall be unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)" (which relates to discrimination in regard to hire on tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization).

The violation of Section 8(b)(1)(A)—that is, the coercion of the employees in the exercise of the right to refrain from union membership, guaranteed in Section 7—lies in the attempts of the union either to put the employer out of business or to force him to sign a contract which would require all of the employees to join the Union. The Union admits that a very real attempt was made both by the use of pickets and requests to customers that they cease doing business with the employer. The union knew, the employees knew, and the employer knew that if the union succeeded in curtailing or destroying the employer's

business there would be no jobs for the employees. There was, therefore, a threat to the employees that if they did not join the union they would be back on the labor market if the union were successful.

The violation of Section 8(b)(2)—that is, the attempt to cause an employer to discriminate against an employee in order to encourage union membership—lies in the picketing and contacting of customers by the union in order to force the employer to sign a union shop contract against his employee's will. Had the employer signed the union ship contract he would have had to discharge the employees who did not choose to become union members within 30 days after the signing of the contract.

Section 8(a)(3) of the Act points up the fact that forcing an employer to sign a union shop contract against his employee's wishes was intended to be an unfair labor practice because it provides that the employer may sign a union shop contract "if such labor organization is the representative of the employees as provided in Section 9(a) . . . and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with Sections 9(f), (9), and (b) and unless following an election held as provided in Section 9(c) within one year preceding the effective date of such agreement, the Board shall have certified that a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement." In

other words, the employer would be guilty of an unfair labor practice if he signed a union shop contract when the union was not the representative of his employees or if the union had been decertified as representative. Obviously, the present employer knew that the instant union did not represent his employees, because they had unanimously repudiated the union in an NLRB election. In the present case then, the union attempted to coerce the employer into committing an unfair labor practice by signing a union shop contract against his employees' express wishes, with all parties aware that such a union shop contract would result in discrimination against the employees who would be forced either to join the union or be discharged.

One case analogous to the present situation is that of Local 50, Bakery and Confectionery Workers International Union (AFL-CIO): Arnold Bakers, Inc.) and Arnold Bakers Employees Association, 115 NLRB No. 208, Case No. 2-CC-321, decided May 15, 1956. In that case, after a Board election, the Arnold Bakers Employees Association was certified as the representative of the employees. Local 50 continued to picket after the certification. The Board ordered the union to cease and desist. In arriving at a decision the Board considered the element of free speech and quoted with approval from *International Brotherhood of Electrical Workers v. NLRB* (341 U. S. 694, 19 Labor Cases #66348) where at pages 703 and 704 the Court held:

"To exempt peaceful picketing from the reach of Section 8(b)(4) would be to open the door to the customary means of enlisting the support of employees to bring economic pressure to bear on their employer. The Board quickly recognized that to do so would be destructive of the purpose of Section 8(b)(4)(A). It said, 'To find that peaceful picketing was not thereby prescribed would be to impute to Congress an incongruous intent to permit, through indirection, the accomplishment of an objective, which is forbade to be accomplished directly.' United Brotherhood of Carpenters, 81 NLRB 802, 811."

In the case of *NLRB v. Red Arrow Freight Lines,* 193 Federal II 979, (1952) the Fifth Circuit Court of Appeals said (P. 981):

"This chapter (referring to Section 7 of the Act) was enacted to protect not the rights of unions to obtain representation contracts but rights of employees to be represented by a bargaining agent of their own choosing and such rights must be protected and preserved."

In the case of *NLRB v. Thompson Products,* 162 Federal II 287, (June 5, 1947) at Page 293 the court quoted *DeBardeleben v. NLRB,* 135 Federal II, 13, 15:

"*It cannot be too often stated that the purpose of the act is to leave the employees with a free choice. It is not to subject them to the compulsion of their employer, outside labor unions, the National Labor Relations Board or anybody else,* as to what is their best interest in joining or forming labor organization. Because this is so, it cannot be too often stated by the courts that the fact that workers choose unaffiliated associations is in itself no evidence whatever that those associations are not 'genuine unions' or that the

choice is dominated, interfered with or coerced." (Emphasis supplied)

In the case of *Capital Service, Inc. v. NLRB,* 204 Federal II 848, 23 Labor Cases #67615 decided May 12, 1953, the Ninth Circuit Court of Appeals pointed out that:

> "That the Board has sometimes, in enforcement cases, overlooked the possibilities of Section 8(b)(1)(A) is suggested by what was said in *Labor Board v. Rice Milling Company,* 341 U. S. 665 at page 672, 19 Labor Cases #66346. The Board should be vigilant to see that what was sauce for the goose under the Wagner Act is now sauce for the gander under the Taft-Hartley Act. Nothing could more strongly restrain Services' employees from retaining their non-union status or coerce them into joining the Bakery Union than stopping or making intermittent their employment by picketing with appeals to persuade the public to boycott the products of their work. . . . Here is more than an appeal to the employees to persuade their action. Here is successful economic coercion tending to prevent them from exercising their right to work, by diminishing the public consumption of the product of their work."

The Court then quoted Senator Taft's statements during debate concerning the Act to demonstrate that the intent of the Taft-Hartley Act was to prevent coercion as exercised in the instant case.

A recent National Labor Relations Board decision on the same subject is contained in the case of *Drivers, Chauffeurs and Helpers Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Curtis Bros.,*

Inc. (119 NLRB No. 33), decided October 30, 1957. The opinion states:

> "The realities of our industrial life, lead inescapably to the fact that picketing by its very nature is a signal to all who may approach the picket line or who may work behind it. As the Supreme Court said, the very presence of a picket line may induce action of one kind or another 'quite irrespective of the nature of the ideas being disseminated.' In one case, the object of the picketing may be to prevail upon the employer to change his wage scale; in another to negotiate working conditions with the union instead of with his employees individually. In either event, the purpose of the picketing is to exert a pressure upon the employer after attempts at oral perspasion have failed. But the pressure is necessarily an economic one, a device to reduce the business to the point where his financial losses force him to capitulate to the union's demands. It is immaterial whether the ostensible technique, or the unspoken but necessary consequence, is to cut off the employer's labor supply by preventing the employees from reporting to work; to keep the customers from buying his products; or to interrupt deliveries of supplies to the premises. The important fact of the situation is that the Union seeks to cause economic loss to the business during the period that the Employer refuses to comply with the Union's demands. *And the employees who choose to continue working, while the union is applying this economic hurt to the employer, cannot escape a share of the damage caused to the business on which their livelihood depends. Damage to the employer during such picketing is a like damage to his employees.. That the pressure, thus exerted upon the employees—depriving them of the opportunity to work and be paid—is a form of coercion cannot be gainsaid.*

> *There is nothing in the statutory language of Section 8(b)(1)(A) which limits the intendments of the words 'restrain or coerce' to direct application of pressure by the Respondent Union of the employees.* The diminution of their financial security is not the less damaging because it is achieved indirectly by a preceding curtailment of the employer's interests." (Emphasis supplied)

A more recent decision of the National Labor Relations Board which holds that such picketing is coercive and enjoinable is the case of *General Teamsters, Packers, Food Processors and Warehousemen Union Local No. 912, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al v. H. A. Rider and Sons* (120 N.L. R.B. No. 199), decided June 23, 1958.

Surely, if the Board protects the decision of employees to choose their own association as bargaining representative, it should protect the decision of employees to bargain directly with their employer as in the instant case.

From a consideration of the National Labor Relations Act, itself, the legislative history of the Act, and the cases dealing with picketing after an NLRB election, it would appear that the public policy of the Federal government coincides with the public policy of the State of Washington in forbidding coercive picketing as conducted in the instant case.

C. Reason and Logic Support the Rule That Picketing After Repudiation In a National Labor Relations Board Election and Picketing for a Union Shop Contract In the Absence of Being Certified as Bargaining Representative IS Coercive and Prohibited Under Sections 8(b)(1)(A) and 8(b)(2) of the Act.

Section 9 of the Act is concerned primarily with procedure to establish representation of the employees. Section 8(b)(4)(c) of the Act makes it an unfair labor practice for a union to force an employer to recognize or bargain with a labor organization if another labor organization has been certified as the representative of the employees under the provisions of Section 9 of the Act. Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to enter into a union shop contract against his employees' wishes unless the contract is with a union certified by the NLRB as representative of the employees. One stated purpose of the act is to protect the rights of employees. Surely these provisions must have some meaning.

Of what value is an election procedure if it has no effect? In the instant case the employees freely chose not to be represented by the Union. Their freedom of choice would be protected if they had chosen another union or had chosen their own association. Is it lawful for both the employees and the employer to be subjected to picketing and economic pressure because the employees chose to bargain directly with

their employer? Since Section 7 of the Act grants freedom of choice to the employees is it to be enforced or may it be ignored so as to frustrate one primary purpose of the Act?

Clearly this is not a case where the Union is seeking to perform a service for the employees. The employees have clearly indicated by their unanimous choice that they do not wish to be represented by the union. To allow the union to continue picketing and economic pressure would be to abandon the employees' rights and the employer's rights to the law of the jungle, the law that hold that might makes right.

The National Labor Relations Board has established as a general rule in several cases (*Eclipse Lumber Co.,* (1951) 95 NLRB 464; *Lane v. NLRB,* (CA 10; 1951) 19 Labor Cases #66112, 186 Federal II 671; *Newman d.b.a. H. M. Newman,* (1949) 85 NLRB 725; *Mundet Cork Corporation,* (1951) 96 NLRB 1142; *Pinkerton's National Detective Agency, Inc.,* (1950) 90 NLRB 205; *Smith Cabinet Manufacturing Company,* (1949) 81 NLRB 460) that threats of loss of employment by union representatives which are "reasonably calculated" to have an effect on the listener without regard to the union's ability to carry them out, are violative of the Act. The concerted plan of the union was to put such economic pressure on the employer as was necessary to force the employer to sign a union shop contract against his employees' wishes or to force him out of business. This threat of curtailed operations or cessation of business was a very

real threat to the employees. *The hard facts were that the employees would either be forced into the union or out of employment.* Surely if the employer had threatened the employees with loss of employment if they chose to join the union, he would be guilty of coercion. As Senator Taft stated:

> "The Act for years has contained the provision: 'It shall be an unfair labor practice on the part of an employer' . . . 'To interfere with, restrain, or coerce employees in the exercise of the rights to work and organize.' *All that is attempted is to apply the same provision with exact equality to labor unions,"* (Legislative History of Labor Management Relations Act, 1947, Volume 2, 1207, quoted in *Capital Services, Inc. v. NLRB,* 204 Federal II 848, 23 Labor Cases #67615). (Emphasis supplied)

If the Board does not restrain the picketing and economic pressure in this instance what course of action is open to the employer? Apparently he may continue to operate for as long as possible in the face of picketing, publication in the labor newspaper as being "unfair to organized labor," and attempts by the Union to persuade his customers to deal elsewhere. The Union representative has testified that such tactics will continue until the Board orders them stopped or until he "retires." (Tr. P. 74.) The employer's resources are limited, the union's resources are practically unlimited. The employer, if successful, will suffer the loss of thousands of dollars. If the employer is unsuccessful he may either sign a union shop contract against his employee's express wishes or quit business. If the employer signs a union shop

contract against his employees' wishes he is guilty of an unfair labor practice. If the employer quits business the employees lose their employment. Is this the intent of the Act?

CONCLUSION

Picketing may be prohibited if shown to be for an unlawful purpose. The picketing in this case is for an unlawful purpose because it is contrary to the public policy of the State of Washington and the Federal government as enunciated by statute and case law. The intent and purpose of the National Labor Relations Act is thwarted and frustrated if the freedom of choice of the employees is not protected from coercive action directed against the employees and the employer. Such coercive action directly violates Sections 8(b)(1)(A) and Sections 8(b)(2) of the Act because it is a direct attempt to restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act and because it is a direct attempt to cause an employer to discriminate against the employees in violation of Section 8(a)(3) of the Act by attempting to force the employer to sign a union shop contract against the unanimous wishes of his employees. As a matter of law, justice, and public policy the employer respectfully requests that the Court of Appeals enforce the order of the National

Labor Relations Board restraining the Union from picketing, contacting the employer's customers to discourage them from sending work to the employer, and claiming that the employer is "unfair to organized labor."

Respectfully submitted,

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